

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**JENNIFER L. KRUEGER**

Claimant

V.

**KWIK SHOP, INC.**

Self-Insured Respondent

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Docket No. 1,062,995

**ORDER**

Claimant appealed the July 31, 2014, Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on December 17, 2014.

**APPEARANCES**

Bryce D. Benedict of Topeka, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award, with the exception that the Board does not consider as part of the record claimant's Exhibits 2, 3 and the medical record from Dr. McKinley's office in claimant's Exhibit 4 to the preliminary hearing and part of respondent's preliminary hearing Exhibit F, as set forth below.

**ISSUES**

ALJ Moore determined:

Claimant had preexisting lumbar degenerative disc disease and a disc herniation as a result of a 2009 work accident. She had previously suffered low back pain and radiculopathy as a result of the 2009 accident. She was still symptomatic when released from treatment in 2010, and future flare-ups and treatment were contemplated. On July 18, 2012, while performing activities she had previously performed without difficulty, Claimant had a recurrence of low back pain and radicular pain. MRI films obtained after her 2009 accident and after the 2012 accident were compared, and no changes were seen to suggest a new lesion or change in the physical structure of the body. **Claimant has failed to sustain her burden of proof of personal injury by accident.** Claimant did have an apparent

symptomatic aggravation as a result of the 2012 accident, but her own retained expert has discounted some of those subjective complaints based on undiagnosed, unspecified psychological issues, the nature and extent of which, and the cause of which, have not been established. **Claimant has failed to sustain her burden of proof that her medical condition or resulting impairment or disability "arose out of and in the course of her employment," where her current condition represents an aggravation acceleration of her preexisting condition, or where that preexisting condition has again been rendered symptomatic.** If the 4th edition of the *Guides* was used to measure Claimant's 2009 injury, she would have the same 10% functional impairment for which she qualifies after the 2012 accident. Claimant was terminated for cause for issues unrelated to her 2012 work accident. There is no evidence before the court of task loss. **Claimant has failed to sustain her burden of proof that the accident was the prevailing factor in causing her injury, medical condition, or resulting impairment or disability.**<sup>1</sup>

Further, the ALJ indicated that while the parties preserved as an issue at the regular hearing whether EMT records are excluded by the terms of K.S.A. 2012 Supp. 44-519, neither party briefed that issue and the ALJ considered the issue abandoned.

Claimant contends: (1) she sustained personal injury; (2) the work accident was the prevailing factor causing her injury; (3) K.S.A. 2012 Supp. 44-508(f)(2) does not preclude compensability; (4) claimant sustained a change in the physical structure of her body and her current disability is not the natural progression of her preexisting condition; (5) claimant is at maximum medical improvement (MMI) due to a legal fiction, but in fact she needs treatment and requests she be allowed to choose an orthopedic physician and referrals for treatment; (6) she is entitled to continuing temporary total disability benefits; (7) she has a 13% whole person functional impairment; (8) her medical expenses incurred for treatment of her work injury should be ordered paid as authorized medical benefits; (9) she is entitled to future medical benefits; and (10) the EMT records are admissible and requests the Board rule on that issue, as the ALJ did not.

Respondent contends: (1) claimant did not sustain an injury because the lifting incident at work did not cause a new lesion or change in the physical structure of her body but, rather, rendered a preexisting condition symptomatic; (2) claimant's workplace injury solely aggravated her preexisting condition; (3) claimant's injury did not arise out of her employment because her work incident was not the prevailing factor causing her injury, medical condition or disability; (4) claimant is not entitled to medical treatment; (5) claimant was terminated for cause and is not entitled to temporary total disability benefits; and (6) claimant sustained no new or additional functional impairment.

The issues before the Board on this appeal are:

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<sup>1</sup> ALJ Award at 13 (emphasis in original).

1. Should the ALJ have ruled on the admissibility of EMT records in the Award? If so, are EMT records from the Great Bend Fire Department admissible?
2. Did claimant sustain personal injury? Specifically, did her work accident cause a lesion or change in the physical structure of the body?
3. Did claimant's injury solely aggravate, accelerate or exacerbate her preexisting back condition or render it symptomatic?
4. Was claimant's accident the prevailing factor causing her injury and need for medical treatment?
5. What is the nature and extent of claimant's disability?
6. Is claimant entitled to additional temporary total disability benefits?
7. Is claimant entitled to payment of medical bills?
8. Is claimant entitled to apply for future medical benefits?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

A preliminary hearing was held on August 8, 2013, at which claimant testified, along with Heather Nicholas, a district advisor who supervised the Kwik Shop where claimant worked at the time of the July 18, 2012, incident. The ALJ entered a preliminary hearing order on August 9, 2013, denying claimant's preliminary hearing requests. The ALJ stated:

The competent medical evidence before the court fails to establish that Claimant suffered an injury, a lesion or change in the physical structure of the body as a result of the July 18, 2012 work accident. Even if suspected, but undetected, swelling resulted from the work accident, it only served to trigger or again render symptomatic a pre-existing herniated disc at L3,4. Under the 2011 amendments to the Act [**K.S.A. 2012 Supp. 44-508(f)(2)**], "[a]n injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."<sup>2</sup>

The preliminary hearing order was appealed to the Board. In an October 23, 2013, Order, a Board Member affirmed the preliminary hearing order.

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<sup>2</sup> ALJ Order (Aug. 9, 2013) at 1 (emphasis in original).

The Board incorporates by reference the facts set forth in its Order of October 23, 2013. The Board summarizes below the evidence that was made part of the record after the preliminary hearing. Since the preliminary hearing, Dr. Edward J. Prostic examined claimant a second time and testified. Dr. John P. Estivo, who examined claimant once, was deposed and a regular hearing was held. The parties also stipulated into evidence medical records from Dr. James M. Mahalek, whom claimant saw after her 2009 and 2012 work-related accidents.

Dr. Mahalek first saw claimant on October 8, 2009, for complaints of low back, left buttock and leg pain. Claimant reported the symptoms began on July 20, 2009, while at work for another employer. The doctor reviewed an MRI that revealed multilevel degenerative disc disease predominantly at L3-4 and L4-5 with decrease in signal on T2 weighted images. The MRI showed the L5-S1 disc retained normal disc signal in T2 images, but there was a right paracentral disc bulge. There was no foraminal central canal stenosis. L4-5 showed a right lateral broad-base disc bulge. L3-4 showed a central contained disc herniation that slightly indented the thecal sac, but did not result in significant stenosis. Dr. Mahalek indicated he discussed with claimant that her prognosis most likely would involve a history of chronic low back pain.

Dr. Mahalek saw claimant again on January 28, 2010, after she underwent three epidural injections. Claimant's lumbar radiculopathy had improved. On March 22, 2010, Dr. Mahalek assigned claimant a 7% whole person functional impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

Following her July 18, 2012, work incident, on her own, claimant saw Dr. Mahalek twice. On October 31, 2013, lumbar spine x-rays revealed moderate degenerative disc disease and disc collapse at L4-5 and L5-S1 with a slight retrolisthesis of L4 on L5. No acute bony abnormalities nor other complicating features were noted. On November 19, 2013, the doctor reviewed an MRI and compared it with his notes from the previous MRI he reviewed. Dr. Mahalek indicated the more recent MRI showed degenerative disc disease at L3-4, L4-5 and L5-S1; a right paracentral disc subligamentous herniation resulting in some right-sided narrowing; right paracentral protrusion at L5-S1 with minimal narrowing; a central disc protrusion without significant stenosis at L3-4; nothing in the foramen on the right side; and no left side significant stenosis or abnormalities in the foramen.

Dr. Estivo evaluated claimant at respondent's request on October 19, 2012. He diagnosed claimant with preexisting degenerative protruding discs in the lumbar spine. The doctor opined claimant did not sustain an injury as the result of the July 18, 2012, incident. He also opined the prevailing factor for her low back condition was her preexisting degenerative condition of her lumbar spine. The doctor indicated the fact that claimant returned to work after her prior injury without restrictions and was asymptomatic did not alter his opinion claimant did not sustain a work injury, nor did it alter his prevailing

factor opinion. Dr. Estivo described claimant's degenerative disc disease as a progressive condition that worsens. He testified claimant's degenerative condition was bound to give her problems at any time in the future.

Dr. Estivo testified claimant had a prior low back injury and experienced low back and leg pain, which he construed as radiculopathy. The doctor reviewed claimant's 2009 MRI report from that injury. The doctor indicated he would have provided claimant a 10% whole person functional impairment rating, after her prior injury, using the DRE method set forth in the *Guides*.<sup>3</sup> Dr. Estivo testified he reviewed claimant's August 10, 2012, MRI. He testified that after her July 2012 accident, claimant still had a 10% whole person functional impairment and was in DRE Lumbosacral Category III.

At the request of her attorney, claimant was evaluated by Dr. Prostic a second time on January 14, 2014. The doctor opined:

It continues to be my opinion that on or about July 18, 2012, Jennifer L. Krueger sustained injury to her low back during the course of her employment at Kwik Shop. She continues with severe deconditioning and symptoms of bilateral radiculopathy. Her condition is most likely contributed to by psychological decompensation. It is strongly urged that she be evaluated by a psychotherapist. Orthopedic permanent partial impairment is rated at 20% of the body as a whole on a functional basis, 7% of which is pre-existing. When combined with the suspected emotional problems, the patient is at least temporarily totally disabled from gainful employment. At present, she can do only predominantly sedentary activities with the ability to change position as necessary for comfort.<sup>4</sup>

Dr. Prostic opined the prevailing factor for claimant's injury was lifting a carton of syrup at work on July 18, 2012. Dr. Prostic indicated claimant had psychological issues and he suspected depression or post-traumatic stress syndrome. Before he would recommend surgery, the doctor indicated claimant should undergo psychological testing, an MMPI, and seek help from a psychotherapist. The doctor indicated he would not recommend surgery if claimant had abnormal MMPI results confirmed by a psychotherapist. Instead, Dr. Prostic would recommend injections, medications, an exercise program and psychotherapy.

According to Dr. Prostic, it was not inevitable that given claimant had some preexisting degenerative disc disease, she was one day again going to become symptomatic. He testified that, but for her accident at work, it is not likely she would have

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<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>4</sup> Prostic Depo., Ex. 3 at 2.

been in her current condition. When asked whether claimant's work accident at respondent did more than solely aggravate her preexisting condition, Dr. Prostin testified:

Well, I thought there was a change in her anatomy because she had been told previously by a radiologist and her treating doctors that she had bulging disks before and now I saw evidence of a herniated disk, so I thought there was an anatomic change from this accident. That was the reason for her change in symptoms.<sup>5</sup>

Dr. Prostin testified he reviewed the August 10, 2012, MRI films, but only reviewed the MRI report from claimant's prior injury. The doctor indicated he used the range of motion model under the *Guides*, rather than the DRE method, to arrive at claimant's functional impairment rating. He testified he assigned claimant a 7% functional impairment for her preexisting herniated disc because he was told that it was administratively given to her earlier. The doctor testified that under the range of motion model, if claimant was not operated on, had full range of motion and no symptoms following her prior injury, she would have no residual disability.

Dr. Prostin indicated the *Guides* provides the DRE method is preferred for rating a lumbar spine injury if there is a single injury event to an area previously not impaired. When asked was it not preferred to use the range of motion model as a "differentiator," the doctor replied, "If you're looking only at the book as printed, you're correct, but if you include the writings of the AMA after that on how to use the book, I disagree."<sup>6</sup> The doctor testified that if he used the DRE method, he would be stuck assigning claimant a 10% functional impairment because her diagnosis was radiculopathy. He indicated one defect of the DRE method is that a person with bilateral radiculopathy gets the same rating as one with unilateral radiculopathy.

At the regular hearing, the ALJ indicated Dr. Paul S. Stein's deposition and exhibits thereto, as well as the preliminary hearing transcript, were part of the record. The ALJ indicated any non-medical exhibits to the preliminary hearing would be part of the record. The ALJ also indicated only medical records where the author of those medical records testified or where the parties stipulated them into evidence would be part of the record.

Claimant's counsel requested that claimant's preliminary hearing Exhibit 1 (hereinafter referred to as PH Ex. 1), Great Bend Fire Department EMT records, be made part of the record, to which respondent objected. PH Ex. 1 contained a narrative of how claimant was injured, that she had a prior injury and other information concerning her condition. Claimant argued the exhibit consisted of notes of emergency personnel who are not considered medical providers. Claimant asserted medical providers under the

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<sup>5</sup> *Id.* at 30.

<sup>6</sup> *Id.* at 45.

definition in K.S.A. 2012 Supp. 44-508(j) include specific professions such as medical doctors, but not EMT personnel. The ALJ indicated admissibility of the EMT records was an issue and the parties could address it in their respective evidence gathering and submission letters.

Claimant objected to part of respondent's preliminary hearing Exhibit F (hereinafter referred to as PH Ex. F), specifically a Notice of Determination made in claimant's unemployment claim. The ALJ did not make an immediate ruling, but indicated that was an issue that the parties would have to address in their submission letters.

Claimant's submission letter to the ALJ briefly mentions PH Ex. 1, but does not list admissibility of PH Ex. 1 and PH Ex. F as issues. Respondent's submission letter briefly references PH Ex. F and does not list the admissibility of PH Ex. 1 and PH Ex. F as issues.

The Award states the preliminary hearing transcript with exhibits is part of the record. In a footnote, the ALJ stated: "While the parties preserved as an additional issue whether EMT records are excluded at Regular Hearing by the terms of **K.S.A. 2011 Supp. 44-519**, neither party briefed that issue, and the court considers the issue abandoned."<sup>7</sup> The Award does not address the admissibility of PH Ex. F.

#### **PRINCIPLES OF LAW AND ANALYSIS**

##### **Admissibility of PH Ex. 1 and PH Ex. F**

K.S.A. 2012 Supp. 44-523(a) provides:

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

K.A.R. 51-3-5 states the parties shall send a submission letter to the ALJ that shall contain a list of evidence to be considered by the ALJ, including the list of issues to be decided by the ALJ.

The Board has ruled that issues not addressed or argued to the Board are considered abandoned on appeal.<sup>8</sup> The Board has found that issues not raised before the

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<sup>7</sup> ALJ Award at 9 (emphasis in original).

<sup>8</sup> *Camacho v. Norcraft Companies, LLC*, No. 1,062,102, 2013 WL 6920086 (Kan. WCAB Dec. 12, 2013); *Swank v. Northeast Ohio Communications Network*, No. 1,064,232, 2013 WL 5521849 (Kan. WCAB Sept. 26, 2013); *Jamison v. Sears Holding Corp.*, No. 1,054,942, 2013 WL 1384389 (Kan. WCAB Mar. 8, 2013), *aff'd in part, rev'd in part and remanded with directions*, *Jamison v. Sears Holding Corp.*, No. 109,670,

ALJ will not be considered by the Board. In *Adam*,<sup>9</sup> a Board Member reviewed the preliminary hearing transcript and found respondent failed to raise the issue of timely written claim and, therefore, the issue was not considered by the Board Member. The Board, in *Randel*,<sup>10</sup> determined it did not have jurisdiction to consider an issue after a review of the regular hearing transcript did not show the issue was raised to the ALJ.

Here, claimant raised the admissibility of PH Ex. 1 and PH Ex. F at the regular hearing, but did not list the admissibility of those exhibits in her submission letter as required by K.A.R. 51-3-5.

Claimant raised the admissibility of PH Ex. 1 and PH Ex. F at the regular hearing. Mindful of K.S.A. 2012 Supp. 44-523(a), the Board finds the admissibility of those exhibits may be raised on appeal.

K.S.A. 44-519 states:

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

K.S.A. 2012 Supp. 44-508(j) provides the definition of a health care provider:

“Health care provider” means any person licensed, by the proper licensing authority of this state, another state or the District of Columbia, to practice medicine and surgery, osteopathy, chiropractic, dentistry, optometry, podiatry, audiology or psychology.

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2014 WL 1887645 (Kansas Court of Appeals unpublished opinion filed May 9, 2014) & *Rybeck v. Husky Hogs, LLC*, No. 1,059,545, 2012 WL 6811293 (Kan. WCAB Dec. 7, 2012).

<sup>9</sup> *Adam v. Dave Cook d.b.a. Cook Construction and Clifton Homes, Inc.*, No. 216,254, 1998 WL 51311 (Kan. WCAB Jan. 27, 1998).

<sup>10</sup> *Randel v. Leroy Perry D/B/A Perry Const.*, No. 251,165, 2008 WL 3280288 (Kan. WCAB July 31, 2008).



Claimant argues EMT personnel are not health care providers because they are not licensed to practice medicine and surgery, osteopathy, chiropractic, dentistry, optometry, podiatry, audiology or psychology. In a footnote in *Ellis*,<sup>11</sup> the Board held:

Claimant offered the written ergonomic study into evidence over respondent's objection. The SALJ did not rule on respondent's objection. The basis for respondent's objection was K.S.A. 44-519. However, that provision does not apply because it only limits the admissibility of reports prepared by a "health care provider," which, pursuant to K.S.A. 2009 Supp. 44-508(i), does not include physical therapists. To the extent that the ergonomic study sets forth facts material to the issues in this claim, it is admissible as evidence. Respondent's objections to the ergonomic study go to the weight to which the document should be provided, not its admissibility.

Based upon the definition of health care provider in K.S.A. 2012 Supp. 44-508(j) and the Board's ruling in *Ellis*, EMT personnel are not health care providers and, therefore, Exhibit 1 to the preliminary hearing is admitted.

The Board notes the statements of EMT personnel in the aforementioned exhibit contain the same or similar information provided elsewhere in the record and provided little additional probative value. Claimant testified at the preliminary hearing in detail as to how her alleged work injury occurred.

Claimant asserts that K.S.A. 2012 Supp. 44-709(j) prohibits the Notice of Determination in PH Ex. F from being made part of the record. That statute states:

Any finding of fact or law, judgment, determination, conclusion or final order made by the board of review or any examiner, special examiner, referee or other person with authority to make findings of fact or law pursuant to the employment security law is not admissible or binding in any separate or subsequent action or proceeding, between a person and a present or previous employer brought before an arbitrator, court or judge of the state or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.

Accordingly, the Notice of Determination, the last document in PH Ex. F, shall not be considered part of the record.

#### Personal Injury by Accident

K.S.A. 2012 Supp. 44-508(f)(1) states:

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<sup>11</sup> *Ellis v. City of Overland Park*, No. 1,050,718, 2012 WL 6811286 (Kan. WCAB Dec. 18, 2012), *aff'd*, *Ellis v. City of Overland Park*, No. 109,206, 2013 WL 5507476 (Kansas Court of Appeals unpublished opinion filed Oct. 4, 2013).

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

Drs. Stein and Estivo, after reviewing claimant's pre-accident and post-accident MRIs and/or MRI reports, concluded there was no change in claimant's physical structure. Only Dr. Prostic came to the opposite conclusion. The Board finds the opinions of Drs. Estivo and Stein more credible than those of Dr. Prostic. Dr. Stein, a neutral physician appointed by the ALJ, was the only physician who reviewed both MRI films. Moreover, Dr. Prostic testified he thought there was a change in physical structure because claimant was told previously by a radiologist and treating physicians she had bulging discs before, but now had a herniated disc. The basis for his opinion is suspect.

Claimant asserts a change in physical structure may not be visible on an MRI. Claimant argues because she had pain, there must be a change in her physical structure, and, therefore, she sustained personal injury. The Board disagrees. Not all pain arises from a change in physical structure. Because an asymptomatic preexisting condition becomes symptomatic does not necessarily mean there was a change in physical structure. If claimant's logic were adopted, any time an injured worker had pain from a work injury, he or she would have a change in physical structure and would have sustained personal injury as defined by K.S.A. 2012 Supp. 44-508(f)(1).

The Board finds claimant failed to prove she sustained personal injury by accident, as there is insufficient evidence claimant had a change in her physical structure as a result of her July 2012 accident. With respect to this issue, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

#### Aggravation of Claimant's Preexisting Condition

K.S.A. 2012 Supp. 44-508(f)(2), in part, states:

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

The Board has found work-related injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite claimant also having an aggravation of a preexisting condition. These decisions tend to show compensability where there is a demonstrated physical injury above and beyond an aggravation of a preexisting condition:

- A claimant's accident did not solely cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.<sup>12</sup>
- A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.<sup>13</sup>
- A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.<sup>14</sup>
- An accident did not solely aggravate, accelerate or exacerbate claimant's preexisting knee condition where the court-ordered doctor opined the accident caused a new tear in claimant's medial meniscus.<sup>15</sup>
- Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable.<sup>16</sup>
- A motor vehicle accident did not solely aggravate, accelerate or exacerbate a claimant's underlying spondylolisthesis when the injury changed the physical structure of claimant's preexisting and stable spondylolisthesis.<sup>17</sup>

Conversely, the Board has found claims not compensable because the injury solely aggravated an injured worker's preexisting condition and the work activity was not the prevailing factor causing the injury, medical condition, disability and need for medical treatment:

- Claimant was asymptomatic from 2009 until September 2012, when she twisted her back while attempting to put dishes on a shelf above her head. A Board Member found claimant did not satisfy her burden to prove she

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<sup>12</sup> *Homan v. U.S.D. #259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

<sup>13</sup> *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

<sup>14</sup> *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB July 13, 2012).

<sup>15</sup> *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

<sup>16</sup> *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

<sup>17</sup> *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012).

sustained personal injury as defined under the law in effect on the date of her September 20, 2012, accident.<sup>18</sup>

- Claimant had preexisting AC joint arthritis and asserted he had a possible left shoulder labral tear. A Board Member held the possibility of a labral tear did not rise to a more probably true than not true burden of proof and the labral tear, if present, could be due to a degenerative condition, aging or activities of daily living.<sup>19</sup>
- Unloading heavy boxes from a truck at work solely aggravated, accelerated or exacerbated claimant's preexisting cervical degenerative disease and was not the prevailing factor causing claimant's injury, medical condition or current level of disability.<sup>20</sup>
- An ankle injury sustained when claimant pushed a large trash container solely aggravated a preexisting condition and the accident was not the prevailing factor causing the ankle injury.<sup>21</sup>
- A Board Member found claimant's longstanding degenerative arthritis was a preexisting condition that caused her left knee complaints and need for surgery. Claimant failed to prove pulling a pallet of frozen products at work caused chondral bodies in her left knee to become loose and lodge in her medial compartment.<sup>22</sup>

The greater weight of the medical evidence supports a finding that claimant's preexisting degenerative back condition made her susceptible to future back issues, which could be triggered by many daily or work activities. In 2009, Dr. Mahalek indicated claimant had multilevel degenerative disc disease and her prognosis most likely would involve a history of chronic low back pain. The Board finds claimant's July 18, 2012, injury solely aggravated her preexisting degenerative disc disease. The facts in this case more closely resemble the facts in those cases set forth above, wherein the Board determined the injured worker's injury was not compensable.

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<sup>18</sup> *Hernandez v. Subway*, No. 1,064,281, 2013 WL 4051835 (Kan. WCAB July 3, 2013).

<sup>19</sup> *Rybeck v. Husky Hogs, LLC*, No. 1,059,545, 2012 WL 6811293 (Kan. WCAB Dec. 7, 2012).

<sup>20</sup> *Priest v. Foot Locker Retail, Inc.*, No. 1,062,248, 2013 WL 2455713 (Kan. WCAB May 1, 2013).

<sup>21</sup> *Hastings v. Kansas Expocentre*, No. 1,062,292, 2013 WL 1384405 (Kan. WCAB Mar. 14, 2013).

<sup>22</sup> *Nelson v. Wal Mart*, No. 1,061,944, 2013 WL 1384404 (Kan. WCAB Mar. 18, 2013).

Prevailing Factor

K.S.A. 2012 Supp. 44-508(f)(2)(B) states:

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

Drs. Stein and Estivo opined the prevailing factor for claimant's low back condition was her preexisting degenerative condition. Dr. Prostic opined claimant's accident was the prevailing factor causing her injury and permanent impairment. However, he also indicated claimant's condition was likely contributed to by psychological decompensation. Claimant's low back condition was previously symptomatic and diagnosed. Her symptoms may have increased, but her diagnosis did not change. The Board concurs with the ALJ that claimant failed to prove her work accident was the prevailing factor causing her injury, medical condition and disability.

Nature and Extent of Claimant's Disability

The Board, like the ALJ, concludes this claim is not compensable, but also finds claimant failed to prove by a preponderance of the evidence that she sustained an increase in functional impairment. With respect to this issue, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

CONCLUSION

1. PH. Ex. 1 is part of the record, but the unemployment Notice of Determination in PH Ex. F is not. Claimant's preliminary hearing Exhibits 2, 3 and the medical record from Dr. McKinley's office in claimant's preliminary hearing Exhibit 4 were excluded by the ALJ.

2. Claimant failed to prove she sustained personal injury.

3. Claimant failed to prove her injury arose out of and in the course of her employment with respondent. Specifically, claimant's injury solely aggravated her preexisting degenerative disc disease and she failed to prove her work accident was the prevailing factor causing her injury, medical condition, impairment and need for medical treatment.

4. Claimant failed to prove she sustained an increased functional impairment as a result of her work accident.

5. All other issues raised on appeal are moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>23</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board modifies the July 31, 2014, Award entered by ALJ Moore by finding the Notice of Determination in respondent's preliminary hearing Exhibit F is not part of the record. As indicated above, claimant's preliminary hearing Exhibits 2, 3 and the medical record from Dr. McKinley's office in claimant's preliminary hearing Exhibit 4 are not part of the record. All other preliminary hearing exhibits are part of the record. The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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<sup>23</sup> K.S.A. 2013 Supp. 44-555c(j).

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Honorable Bruce E. Moore, Administrative Law Judge